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IN THE
SUPREME COURT OF THE UNITED STATES

NO. 76-1890 and
NO. 76-2222

76-1573

JIM S. BARNETTE,
Petitioner,

v.
UNITED STATES OF AMERICA,
Respondent.

JAMES H. HOUGE, Acting Secretary of Labor,
United States Department of Labor,
Plaintiff-Appellee,

v.
TROY MOTORS, INC., A Corporation, et al.,
Defendants,

JIM S. BARNETTE,
Defendant-Appellant.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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I. Certiorari should be granted to determine whether the Court of Appeals for the Fifth Circuit erred in affirming a conviction of criminal contempt supported by an order of a District Court which said order wholly fails to forbid, either directly or indirectly, the conduct of the defendant adjudged to be contemptuous.

II. Certiorari should be granted to determine whether the Court of Appeals for the Fifth Circuit erred in affirming the petitioner's conviction of criminal contempt based upon a District Court's order when said order, as tested against the mandate of the Supreme Court of the United States as found in International Longshoremen's Association v. Philadelphia Marine Trade Association, 389 U.S. 64, 76, 88 S.Ct. 201, 192 L.Ed.

which requires that a court order assume the posture of a criminal statute and that before said order can support an adjudication of criminal contempt, the order must be certain enough so that a person can know precisely the conduct which could land him in jail, utterly fails to meet such test.

III. Certiorari should be granted to determine whether the Court of Appeals for the Fifth Circuit erred in affirming a conviction of criminal contempt based upon violation of a District Court's order, when said order utterly fails to meet the test as established by the Supreme Court of the United States in International Longshoremen's Association v. Philadelphia Marine Trade Association, 389 U. S. 64, 76, 88 S. Ct. 201, 192 L.Ed. 236 (1967), by failing to apprise the accused contemnor, either directly or indirectly, precisely what conduct of his or anyone acting for him might cause him to go to jail.

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STATUTE:

29 U.S.C. 201, et seq.

TABLE OF AUTHORITIES:

International Longshoremen Association v. Philadelphia Marine Trade Association,

389 U.S. 64, 76, 88 S.Ct. 201, 19L.Ed. 236 (1967).

Gunn v. University Committee to End the War in Viet Nam,

339 U.S. 382, 90 S.Ct. 2013, 26 L.Ed. 2d 684 (1970).

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OPINIONS BELOW

The Petitioner, Jim S. Barnette, was found guilty of civil and criminal contempt for violating an Injunctive Order of the United States District Court for the Middle District of Alabama, dated February 3, 1975, and said guilty finding was entered on the 22nd day of March, 1976 in the United States

District Court for the Middle District of Alabama. The judgment of said District Court which is appended herein at 13a is the same judgment which the Petitioner was subsequently determined to have criminally violated.

The opinions of the United States Court of Appeals for the Fifth Circuit are appended herein at 1a-12a.

JURISDICTION

The judgment of the Court of Appeals was entered on January 31, 1977, and, following rehearing, on March 25, 1977.

The jurisdiction of this Court is invoked under 28 U.S.C.A. §1254(1). Jurisdiction of the U. S. District Court for the Middle District of Alabama and of the U. S. Court of Appeals for the Fifth Circuit were invoked by virtue of the fact that Petitions for Prosecution of Civil Contempt and Criminal Contempt were filed therein charging violation of the said District Court order appended herein at 13a.

QUESTIONS PRESENTED FOR REVIEW

1. In a case where an accused is charged with criminal contempt of a court order, does not the Court's Order in question adopt the posture of a criminal statute for test purposes so that, before conviction for criminal contempt can be had, the conduct prohibited of the accused required for conviction must be so clearly spelled out in the Court's Order so as to adequately apprise the defendant of the conduct he must avoid and, if the order be violated, provide a basis for determining the existence of the essential elements for conviction of willfulness and intent to violate such Order of Court?

2. In a case where the accused has appealed his conviction of criminal contempt, must not the Appeals Court make a determination of whether the District Court's Order, the basis of the contempt adjudication, is sufficiently clear, precise and specific, so as to assure the defendant that his conviction has a solid foundation both in law and in fact?

3. If a Court Order fails to state precisely what conduct of the defendant may result in a finding of criminal contempt, can such an order support a conviction for criminal contempt?

STATUTES INVOLVED

29 U.S.C. 201, et seq.

Fair Labor Standards Act of 1938, as amended, provides, generally, for minimum wage and hourly rates for employees covered by the Act.

Provides for 40 hour work week and overtime compensation for hours worked in excess of 40 hours work.

Provides mandatory record keeping by employers covered by the Act of employment practices, including records of all transactions with employees.

STATEMENT OF THE CASE

The prosecutions for civil contempt, for criminal contempt, against the Defendant Jim S. Barnette, began with the simultaneous filings of petitions for prosecution for civil contempt, for criminal contempt, filed in the United States District Court for the Middle District of Alabama on January 20, 1976. Said petitions charge, in substance, that the Defendant Jim S. Barnette violated the judgment and order of the United States District Court for the Middle District of Alabama entered on the 3rd day of February, 1975 in its Case No. 74-289-N, in that, the Defendant Jim S. Barnette continued to violate the provisions of the Fair Labor Standard Act of 1938 as amended, 29 U.S.C. 201, et seq. and subsequent to the entry of judgment referred to, did willfully violate the prohibitions of said judgment by coercing many of the employees to whom back wages were found due and paid to kickback certain portions of said payments to the said Defendant.

Orders to Show Cause issued to Defendant Jim S. Barnette in both contempt proceedings. Both proceedings (Show Cause Orders), for civil contempt, for criminal contempt, were set at the same time and place and were combined for trial.

The Defendant Barnette pled not guilty to both charges. Upon conclusion of the Government's case, the Defendant Barnette rested, placing the entire burden upon the Government and the evidence it presented to substantiate the Defendant's guilt or innocence.

The trial judge found the Defendant Jim S. Barnette guilty of both civil and criminal contempt.

The Defendant appealed to the United States Court of Appeals for the Fifth Circuit, contending that insofar as the civil contempt conviction was concerned since only the Defendant's actions and not specific intent or willfulness are necessary to support conviction, though Defendant maintained his innocence, the trial judge could have reasonably found the weight of the evidence against him. However, insofar as the criminal contempt conviction was concerned, the Defendant Barnette maintained that the very Order of the District Court itself wholly failed to apprise the Defendant of the act or acts complained of in the petition for contempt not to mention whether the required elements of willfulness and intent existed or that the doing of such act or acts or omission of them would constitute criminal contempt.

The United States Court of Appeals for the Fifth Circuit rendered its split decision on January 31, 1977 affirming in part and remanding in part with Roney, Circuit Judge, concurring in part and dissenting in part. It is the Defendant's contention that Judge Roney precisely stated in his dissenting opinion the Defendant Barnette's contentions:

> Although I concur in the decision that Barnette's civil contempt should be upheld, I respectfully dissent from the affirmance of his criminal contempt conviction, page 1265.

The defendant (Barnette) technically complied with the district court's order, but ran afoul of its purpose in receiving back from various employees part of the money paid to them.

Criminal contempt is entirely different (from civil contempt). The court order becomes a criminal statute and the conduct required for conviction requires willfulness and intent to violate the order. In re Joyce, 506 F.2d 373 (5th Cir. 1975), page 1265.

While the order was clear in requiring the defendant to pay back wages, it is not clear in declaring that receiving funds back from the employees would constitute prohibited conduct. When this uncertainty is combined with the equivocal testimony which each witness gave on the stand, it does not seem to me that a trier of fact could find beyond all reasonable doubt that Barnette had willfully engaged in conduct that he could reasonably know was criminally prohibited. A court order, like a criminal statute, must be certain enough so that a person can know precisely the conduct which could land him in jail. Longshoremen v. Marine Trade Assn., 389 U.S. 64, 76, 88 S.Ct. 201, 19 L.Ed.2d 236 (1967). I do not think that situation existed in this jail-term criminal conviction, page 1266.

The Defendant Barnette once again asserts to this Honorable Court that the court order of which he has been convicted of intentionally and willfully violating did not forbid him, either directly or indirectly, to do that which he has been found guilty of doing. In fact, the Court order itself completely failed to apprise him that such conduct could result in his committing a criminal act.

Upon rehearing, the United States Court of Appeals for the Fifth Circuit reaffirmed its original findings and totally ignored the question presented by the defendant in brief. Their decision was rendered March 25, 1977.

On the 7th day of April, 1977, counsel for the defendant Barnette was notified that his motion to stay mandate of the Appeals Court pending application for certiorari in the Supreme Court had been granted to and including April 25, 1977.

The defendant Barnette respectfully files this his Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit in this Honorable Court.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE COURT OF APPEALS FOR THE FIFTH CIRCUIT ERRED IN AFFIRMING A CONVICTION OF CRIMINAL CONTEMPT SUPPORTED BY AN ORDER OF A DISTRICT COURT WHICH SAID ORDER WHOLLY FAILS TO FORBID, EITHER DIRECTLY OR INDIRECTLY, THE CONDUCT OF THE DEFENDANT ADJUDGED TO BE CONTEMPTUOUS.

II. CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE COURT OF APPEALS FOR THE FIFTH CIRCUIT ERRED IN AFFIRMING THE PETITIONER'S CONVICTION OF CRIMINAL CONTEMPT BASED UPON A DISTRICT COURT'S ORDER WHEN SAID ORDER, AS TESTED AGAINST THE MANDATE OF THE SUPREME COURT OF THE UNITED STATES AS FOUND IN INTERNATIONAL LONGSHOREMEN ASSOCIATION v. PHILADELPHIA MARINE TRADE ASSOCIATION, 389 U.S. 64, 76, 88 S.Ct. 201, 192 L. Ed. 236 (1967) [WHICH REQUIRES THAT A COURT ORDER ASSUME THE POSTURE OF A CRIMINAL STATUTE AND THAT BEFORE SAID ORDER CAN SUPPORT AN ADJUDICATION OF CRIMINAL CONTEMPT, THE ORDER MUST BE CERTAIN ENOUGH SO THAT A PERSON CAN KNOW PRECISELY THE CONDUCT WHICH COULD LAND HIM IN JAIL] UTTERLY FAILS TO MEET SUCH TEST.

III. CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE COURT OF APPEALS FOR THE FIFTH CIRCUIT ERRED IN AFFIRMING A CONVICTION OF CRIMINAL CONTEMPT

BASED UPON A VIOLATION OF A DISTRICT COURT'S ORDER, WHEN SAID ORDER UTTERLY FAILS TO MEET THE TEST AS ESTABLISHED BY THE SUPREME COURT OF THE UNITED STATES IN INTERNATIONAL LONG SHOREMEN ASSOCIATION v. PHILADELPHIA MARINE TRADE ASSOCIATION, 389 U.S. 64, 76, 88 S.Ct. 201, 19 L.Ed.2d 236 (1967), BY FAILING TO APPRISE THE ACCUSED CONTEMNOR, EITHER DIRECTLY OR INDIRECTLY, PRESICELY WHAT CONDUCT OF HIS OR ANYONE ACTING FOR HIM MIGHT CAUSE HIM TO GO TO JAIL.

As counsel for the Defendant Barnette, I humbly and respectfully re uest this Honorable Court to take jurisdiction of this cause and to take your most valuable time to examine the district court's order in this cause and determine whether or not it meets the mandates as previously set by this Honorable Court in International Longshoremen Association v. Philadelphia Marine Trade Association, 389 U.S. 64, 76, 88 S.Ct. 201, 19 L.Ed.2d 236 (1967). This request is made not solely for the purpose of preventing a citizen of the United States from being marred for the rest of his life as a criminal, but also for the purpose of establishing clearly and succinctly that the power of the judiciary to punish for violations of its own orders is not only limited by the Congress of the United States but also by its highest Judicial forum, this Honorable Court.

Our contention, on behalf of the defendant, is simple; the district court's order which enjoined the defendant from further violations of the Fair Labor Standards Act of 1938 as amended, simply did not apprise the defendant

of certain conduct the violation of which could result in his prosecution and conviction for criminal contempt.

If the two affirming Circuit Judges of the Fifth Circuit Court of Appeals had written to the question presented here, as did their brother Roney, the defendant Barnette would not be before this court now. Neither on the direct appeal nor on rehearing did the majority of justices address the question of the sufficiency of the district court's order to sustain a finding of defendant's guilt of criminal contempt.

We respectfully and humbly submit that there was not one statement, not one word, not one innuendo in the district court's order which could have apprised the defendant that if he received voluntary partial payments back from the employees after they were paid, his conduct would have amounted to criminal behavior punishable by fine and imprisonment.

The defendant Barnette was sentenced to thirty days in the custody of the United States Attorney and fined $1,000.00. We abhor the district court's findings in this regard and were only able to get the attention of one of three Circuit Judges who heard the case on appeal. On rehearing, the question was totally ignored by the court writing to questions secondary and of no real relevance to the primary question which is the sufficiency of the district court's order to sustain a finding of criminal contempt.

As counsel for the defendant Barnette and as an officer of this and all preceding

courts to which this matter has been taken, I am totally unable to explain to my client the inability of our judiciary to have answered our original question, whether or not the District Court's Order sufficiently apprised defendant Barnette that the doing of the conduct complained of would be in contravention of the court's order forbidding him such conduct.

I respectfully represent to this Honorable Court that the district court's order wholly fails in this regard and that its order cannot support a finding of criminal contempt against the defendant Barnette.

The United States Court of Appeals for the Fifth Circuit previously has followed the mandates of International Longshoremen Association v. Philadelphia Marine Trade Association, 389 U.S. 64, 76, 88 S.Ct. 201, 192 L.Ed. 236 (1967), as is evidenced by its holding in In re Joyce, 506 F.2d 373 (5th Cir. 1975). In the instant case, however, the court wholly fails to apply its own previously established standards regarding the sufficiency of court orders and their ability to support contempt findings commensurate with the Supreme Court's holding in Longshoremen, supra, by failing to apply the required test of a clear, unambiguous and specific court order precisely stating the conduct expected of the defendant, the violation of which could result in a criminal contempt conviction, the Appeals Court has effectively abrogated this court's holding in Longshoremen, supra.

We respectfully submit that the district court's order in this cause cannot support an adjudication of criminal contempt for its

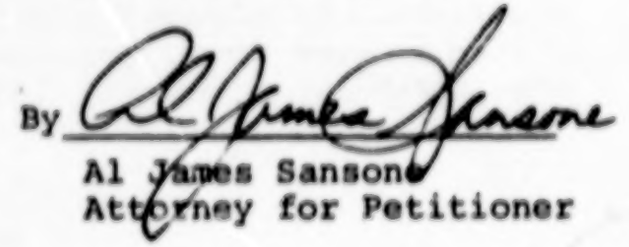
violation because it lacks the necessary clarity, preciseness and specificity required by decisions of the Supreme Court of the United States.

CONCLUSION

For the above reasons, petitioner respectfully request that the writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

Volz, Capouano, Wampold,
Prestwood & Sansone

By 

Al James Sansone
Attorney for Petitioner

CERTIFICATE OF SERVICE

I, Al J. Sansone, Attorney of Record for the Petitioner in the above styled cause, do hereby certify that I have served 3 copies of the foregoing Petition for Writ of Certiorari upon Ira DeMent, United States Attorney for the Middle District of Alabama, Post Office Building, Montgomery, Alabama, 36104, Carin Ann Clauss, Counsel for Secretary of Labor, United States Department of Labor, 200 Constitution Avenue, N.W., Room N-2620-A, Washington, D.C. 20210, Robert H. Bork, Office of Solicitor General, Room 5143, Department of Justice, Washington, D.C. 20530, and Edward L. Wadsworth, Clerk, United States Court of Appeals for the Fifth Circuit, 600 Camp Street, New Orleans, Louisiana, by placing a copy of same in the United States Mail, postage prepaid, on this the 21st day of April, 1977.

Al J. Sansone
Attorney for Petitioner

APPENDIX

UNITED STATES v. BARNETTE

UNITED STATES of America,

Plaintiff-Appellee,

v.

JIM S. BARNETTE,

Defendant-Appellant.

James H. HOGUE, Acting Secretary of Labor, United States Department of Labor, Plaintiff-Appellee,

v.

TROY MOTORS, INC., a corporation, et al., Defendants,

Jim S. Barnette, Defendant-Appellant.

Nos. 76-1890, 76-2222.

United States Court of Appeals,
Fifth Circuit.

Jan. 31, 1977.

The United States District Court for the Middle District of Alabama, at Montgomery, Frank M. Johnson, Jr., Chief Judge, entered judgments convicting defendant of civil and criminal contempt, and he appealed. The Court of Appeals, Tuttle, Circuit Judge, held that defendant's conviction of criminal as well as civil contempt, based on a determination that his wholly-owned corporation, after

making payments of back wages to employees under the compulsion of a consent decree, coerced certain employees to make partial kickbacks of the amounts paid, was supported beyond a reasonable doubt by sufficient evidence; but that the sentence imposed upon defendant for criminal contempt, namely, 30 days' custody and a fine of $1,000, went beyond that authorized, as the relevant statute provides that a federal court shall have power to punish by fine "or" imprisonment a contempt of its authority.

Affirmed in part and remanded in part.

Roney, Circuit Judge, concurred in part and dissented in part, with opinion.

1. Contempt -60(3)

Defendant's conviction of criminal as well as civil contempt, based on a determination that his wholly-owned corporation, after making payments of back wages to employees under the compulsion of a consent decree, coerced certain employees to make partial kickbacks of the amounts paid, was supported beyond a reasonable doubt by sufficient evidence, including various employees' testimony that the initial suggestion of repayments came through company's lawyer and/or supervising employees, undisputed evidence that defendant caused the company's books to contain false entries, and further undisputed evidence that defendant directed that false records be maintained for the purpose of covering up the receipt by him of kickback amounts not paid in cash.

Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.; 18 U.S.C.A. § 401.

2. Contempt -72

Sentence imposed upon defendant for criminal contempt, namely, 30 days' custody and a fine of $1,000, went beyond that authorized, as the relevant statute provides that a federal court shall have power to punish by fine "or" imprisonment a contempt of its authority. 18 U.S.C.A. § 401.

Appeals from the United States District Court for the Middle District of Alabama.

Before TUTTLE, CLARK and RONEY, Circuit Judges.

TUTTLE, Circuit Judge:

These are appeals from conviction of appellant, Barnette, of civil and criminal contempt in a case arising from a consent order enjoining violation by him and his Troy Motors, Inc., a corporation, of the terms of the wage and hour laws. The specific charge of which appellant was found guilty is that after the corporation had made payments to some 20 employees under the consent order[1] Barnett "wilfully violated the prohibitions

1. The consent decree enjoined Troy Motors, Inc. and its principal official and shareholder, Jim S. Barnette, from violating the minimum wage and overtime compensation provisions of the

(Footnote continued)
Act, 29 U.S.C. § 201 et seq., and ordered them to pay $7,759.54 to the secretary for distribution to employees as back wages due them.

of the judgment by coercing many of the employees to whom back wages were found due by the court to make partial kickback of back wages previously paid by defendants to said employees pursuant to the said court order."

[1] The trial court dismissed both civil and criminal complaints against the corporation. There can be no doubt about the sufficiency of the evidence to sustain the court's determination that Barnette was guilty of civil contempt as will be demonstrated by the discussion hereafter with respect to the criminal case. We also conclude that under the standard that the Government must prove guilt of criminal contempt beyond a reasonable doubt, United States of America v. Alek Fidanian, 465 F.2d 755 (5th Cir. 1972), Barnette's conviction in the criminal contempt case must also be affirmed.

It is undisputed that five of the employees of Troy Motors, Inc., a corporation wholly-owned by Barnette, received payments from the Secretary of Labor resulting from the consent decree which ordered the company to make payments as back wages due to 20 of its employees in the total amount of $7,759.54 and that of that amount five of the employees had refunded to Barnette the sum of $1,783.72. Appellant bases his claim of the lack of sufficient evidence to

permit a finding of guilt primarily on the fact that each of the five persons gave testimony at the trial which, if totally believed by the trial court, would have supported a finding that all of the "kickbacks" were voluntary. On the other hand, it is equally clear that testimony given by at least four out of the five, and possibly the fifth as well, would support a finding that there was some element of coercion or threat as the motivating factor which resulted in these employees paying back, generally, about two-thirds of the amount each of them received for unpaid wages under the consent decree. We need not consider whether even a totally voluntary repayment by these employees and its acceptance by Barnett would have been sufficient to sustain a criminal charge. It certainly would have been sufficient to sustain the charge of civil contempt under the long line of cases which hold uniformly that employees cannot, by their consent exculpate their employer, from complying strictly with the requirements of the wage and hour laws, Brooklyn Bank v. O'Neil, 324 U.S. 697, 65 S.Ct. 895, 89 L.Ed. 1296 (1945) and see Mayhew's Super Liquor Stores, Inc. v. Hodgson, 464 F.2d 1196 (5th Cir. 1972), where in footnote 1, page 1197, this Court said:

> "'The legislative history of the Fair Labor Standards Act shows an intent on the part of Congress to protect certain groups of the population from substandard wages and excessive hours which endangered the national health and well-being and the free flow of goods in

interstate commerce. The statute was a recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency and as a result the free movement of goods in interstate commerce. To accomplish this purpose standards of minimum wages and maximum hours were provided. Neither petitioner nor respondent suggests that the right to the basic statutory minimum wage could be waived by any employee subject to the Act. No one can doubt but that to allow waiver of statutory wages by agreement would nullify the purposes of the Act.' 324 U.S. at 706-707, 65 S.Ct. at 902. Following Brooklyn Bank, a number of cases have held that contractual understandings which have the effect of 'circumventing or invading the command of the Wage and Hour Act' are invalid and unenforceable. Mitchell v. Turner, 286 F.2d 104 (5th Cir. 1960); Wood v. Meier, 218 F.2d 419, 420 (5th Cir. 1955); Handler v. Thrasher, 191 F.2d 120, 123 (10th Cir. 1951); Mitchell v. Greinetz, 235 F.2d 621, 625 (10th Cir. 1956); Caserta v. Home Lines Agency, Inc., 273 F.2d 943, 946 (2nd Cir. 1959)."

But here there was much more for the trial court to base its decision on. The trial court, resolving all questions of credibility, which necessarily played a

substantial part in the trial because of the relationship of employer and employee, could have found the following facts with respect to the five employees and the amounts they paid to Barnette out of the refunds they received for unpaid back wages.

I. LUCY GAYLORD: Mrs. Gaylord was a bookkeeper. She worked under Don Hutson, the office manager, whose wife Lynn Hutson, was the head bookkeeper. Before receiving her back paycheck from the Labor Department, Mrs. Gaylord was approached by the lawyer for defendants, Barron, who asked her whether she intended to return the money to Barnette. She replied that she probably would but was undecided. She was also asked by the head bookkeeper, Mrs. Hutson, the wife of her boss, whether she had yet received the check and whether she was going to return it. To this she answered "yes." When she received her check, she kept it for a few days to see what the others were going to do; she finally told Barnette she wanted to return the check to him. She said: "I went to Mr. Barnette and told him that I had my check and wanted to give it back to him and asked him how to give it back to him, and he told me just to have a steak dinner and give him the balance." [Emphasis added.] The record discloses that Gaylord's steak dinner cost her only $8.28, because she refunded $31.72. In response to a question on cross-examination as to whether Barnette asked her "to give that money back to him or to Troy Motors" she answered: "No, sir, not directly."

Following the cross-examination, the following testimony was given:

"THE COURT: You testified that you were not coerced directly?

WITNESS: Yes, sir.

THE COURT: The implications of that statement to me is that you may have been coerced indirectly.

WITNESS: Well, nobody ever really—

THE COURT: Will you explain to me what you meant when you said, 'Not directly'?

WITNESS: Well, nobody ever really told me that I would lose my job if I didn't give the money back; but, I mean, it was just — you know, everybody was kind of afraid, I guess you could say that, what might happen if they didn't. Nobody really had any concrete evidence that it would, I don't think."

At the time of the consent decree, she had been working for $75.00 a week on a 44 hour week schedule.

II. WILLIAM HEAD: As was the case with other employees, Head was interviewed by defendant's counsel, Barron, who told him that the company was going to have to pay back wages and asked whether he thought he had been underpaid. Head replied that he had not; he was later told by Barnette personally that he would be receiving a check and "he would like to have some of it back, if possible." Head received a check for $589. After paying some of the amount out of

his checking account to pay bills with, he gave Barnette $100 in cash and had $75 deducted subsequently from his regular paycheck, which was entered on the company's books as charges for advances. In response to the question whether Head had any conversation with Mr. Barnette about how much of the $589 he "could" keep, Head testified: "We agreed that he would give us a third of it; yes, sir, and we give him the other back." Head fared better than the other employees, because he had spent more of his refund and had only $100 cash left to refund to Barnette and these proceedings ensued before the remaining total of $250 could be deducted from his wages. Head was the company's service manager and had charge of all employees in the shop area, including at least some of the other three employees. He held a meeting in his office where he discussed with the others the idea of returning their back pay, explaining that the company was in trouble and that they might lose their jobs, although he testified he was not told by Barnette to say this.

III. DARREL CORLEY: Corley, with an eighth grade education, greased cars and handled lubrication and oil changes in the service department. He received a check for $716. He gave back "two or three hundred" and said he still "owe[d] him some more money." He identified a charge against his account of $177 as to which Barnette had told him that if anybody asked him that "this $177 was for money he loaned [him] to pay doctor's bills." He testified that no such loan had been made and he had not had any doctor's bills paid by the company. As-

suming the cash payment to have been $300, this when added to the $177 would equal almost precisely two-thirds of the refund check for $716 that he received. After repeated direct and cross-examination, his testimony finally arrived at the following exchange:

> "Q. [By Government counsel] You say that Mr. Barnette said if you were ever asked, to tell him that was for doctor bills—
>
> A. (Nodded to indicate affirmative reply).
>
> Q. —after your wife had a baby?
>
> A. Right.
>
> Q. Who arrived at the figure of a hundred and seventy-seven dollars, Mr. Barnette or you?
>
> A. I don't know; I don't know nothing about that hundred and seventy-seven dollars, tell you the truth.
>
> Q. You just know you didn't get it?
>
> A. Right.
>
> Q. All right, sir. Do you know that that—that money was withheld from that—from your pay check to make up this hundred and seventy-seven dollars?
>
> A. (Nodded to indicate affirmative reply)

Q. You do know that?

A. Right."

The computations made a part of the order of refund in the civil case show that the total amount paid by Corley to Barnett and deducted by the company from his subsequent paychecks equal $477, within pennies of two-thirds of the amount of his refund check of $716.

IV. JIMMY GOLDEN: The first suggestion to Golden with respect to paying back part of his check from the Government came from the company's counsel, Barron, who got him also to concede that he had been paid everything he thought was owed him and told him the company was involved in a lawsuit pertaining to overtime and minimum wage and further that he had asked Golden if he was expecting any additional money back. He asked what Golden was going to do with the money if he got some from the Government. Golden replied: "I said I would give it back." Upon receiving his check, Golden deposited it in the bank, where it remained for about three weeks. In response to the question: "What did you do with it," he answered, "I paid it back to the company, what percentage of it they asked for back." The testimony then continued:

"Q. Who asked for the percentage back?

A. Well, didn't nobody ask for it; he just said we could give it back if we wanted to.

Q. How much did you give back?

A. $600.

Q. How much did you pay—was all of it in cash?

A. No, sir. $550.

Q. And who did you pay that to?

A. I give it to Mr. Barnette.

Q. What about the other $50?

A. I told him to put it—take it out on my account, put it on my account.

Q. And did he do that?

A. Yes, sir."

Subsequently the following testimony was received:

"Q. [By Government counsel]. Do you recall, after you received your check, having any meetings with Ronnie Head, with Darrel Corley, and with Raymond Crews and Mr. Barnett?

A. Well, only one.

Q. When did that meeting take place?

A. I don't remember what day.

Q. Well, about when; was it after these checks were received?

A. Yes, sir; I think it was.

Q. Was it before you paid Mr. Barnette the five hundred and fifty dollars?

A. Yes, sir.

Q. What was said at that meeting?

A. Well, he just said we could give it back if we wanted to or we could keep it if we wanted to.

THE COURT: He, who?

WITNESS: Mr. Barnette.

Q. How did you arrive at the six hundred dollars that you were going to pay him back?

A. Well, he said we could keep some, we could give some of it back, or whatever.

Q. Well, what was the factor that made you decide to keep approximately two—one-third and give back two-thirds?

A. Well, I reckon Ronnie Head or somebody said we could give back a third and keep—give two-thirds back and keep a third."

Barnette asked Golden twice whether he had gotten his check from the Government. On the first occasion, Golden had not received it and told Barnette so. On the second occasion, he had received it, but again told Barnette that he had not. This

was when Head, the service manager, had his meeting at which "we decided what we were to give" and further, "Mr. Head told me not to tell him we had got our checks, because—because he was our boss man, and I had to do what he said, too."

V. RAYMOND CREWS: The final employee witness was Raymond Crews, a laborer in the clean-up department. He received a refund check of $789, which he said he kept about three weeks. He said he did not recall the meeting in Head's office which others testified he attended. He handed Barnette a $500 bill which he decided to pay back because "I had it home; I didn't want to keep saving it, so I went ahead and took it up there to him" and also, because "well, he had always paid me what he say he was going to pay me a week, so I decided to give it to him." He then referred to the meeting which previously he had not remembered and spoke of it in the following terms: "Well, when Ronnie Head and Golden was up there talking in the shop that we going to give it back, that is the only time anybody was talking about it." This is the session as to which Head testified: "We agreed that he would give us a third of it; yes, sir, and we give him the other back." Two-thirds of Crews' refund would have been $532.

Of course, as already indicated, each of the witnesses undertook to testify that he or she did not feel under coercion or threat upon making the decision to give back what in each case amounted to almost precisely two-thirds of the amount of the refund received by each. However, with the exception of Raymond Crews, each of the witnesses included testimony inconsistent with this conclusion. Recognizing that they

were all still employed by the company owned by Barnett, the court could well have concluded that the exculpatory statements were made in an effort by the several witnesses to put as favorable a picture on their relationship with their employer as possible. There is no doubt that the initial suggestion of repayments to the company came through the intervention of the company's lawyer and/or supervising employees. It was also perfectly clear that an agreement of some sort was entered into with respect to the percentage of the salary payments that were to be repaid to Barnette. The trial court was wholly justified in determining that such agreement was one which the employees could not safely decline to accept when hammered out in the service manager's office in the presence of Barnette.

With respect to the requirement that Barnette's conduct was shown to be willful, it is clear that the undisputed evidence that he had caused the books of the company to contain false entries and that he had instructed the employees to give a false report if questioned about the charges which were made against them in order to obtain his full two-thirds, were more than sufficient to establish a willful purpose to violate the court's order. This Court has said in United States v. Fidanian, supra:

> "To sustain a finding of willfulness the government need not prove evil motive on the part of the defendant. It is sufficient if the defendant's actions were deliberate, voluntary, or intentional, as distinguished from accidental, inadvertent, or negligent." Citing cases 465 F.2d at 760.

The Court there pointed to the fact that three of the employers' workers, including his bookkeepr, testified that he had directed the falsification of employee time and wage records. Here, too, there is undisputed evidence that Barnette had directed that false records be maintained for the purpose of covering up the receipt by him of the amounts that were not paid to him in cash.

[2] The United States, by commendable candor, during oral argument conceded that the trial court had given Barnette a sentence beyond that authorized for the punishment of criminal contempt. U.S. Code Title 18, § 401 provides:

> "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as . . .
>
> (3) Disobedience or resistence to its lawful writ, process, order, rule, decree, or command."

It will be noted that this language provides for punishment in the alternative for fine or imprisonment. The section does not include the language contained in other criminal statutes "or both." The language of the statute seems clearly to require the result announced by the Supreme Court as to an earlier statute in In Re William V. Bradley, 318 U.S. 50, 63 S.Ct. 470, 87 L.Ed. 500 (1943). The Court there said with respect

to a sentence arising from the enforcement of a labor board decision:

> "Under § 268 of the Judicial Code, 28 U.S.C. § 385, (the predecessor section) the sentence could only be a fine or imprisonment." [Emphasis in original.] Citing Ex Parte Robinson, 19 Wall. 505, 512, 22 L.Ed. 205; Clark v. United States, 8 Cir., 61 F.2d 695, 709; affirmed 289 U.S. 1, 53 S.Ct. 465, 77 L.Ed. 993.

The judgment of guilty and the civil penalty in the civil case is affirmed.

The judgment of guilty of criminal contempt is affirmed.

That part of the judgment in the criminal contempt case prescribing 30 days' custody and a fine of the sum of $1,000 must be vacated. The case is remanded to the trial court for a revision of the sentence within the terms allowed by the statute.

AFFIRMED in part and REMANDED in part.

RONEY, Circuit Judge, concurring in part and dissenting in part:

Although I concur in the decision that Barnette's civil contempt should be upheld, I respectfully dissent from the affirmance of his criminal contempt conviction.

The defendant technically complied with the district court's order, but ran afoul of its purpose in receiving back from various employees part of the money paid to them. Citation for civil contempt,

with an opportunity to purge one's self, is little more than a method of enforcement. Lewis v. S. S. Baune, 534 F.2d 1115 (5th Cir. 1976); Norman Bridge Co. v. Banner, 529 F.2d 822 (5th Cir. 1976). Only action and not specific intent or willfulness need be shown to trigger the civil contempt enforcement procedure to obtain compliance with the decree. McComb v. Jacksonville Paper Co., 336 U.S. 187, 191, 69 S.Ct. 497, 93 L.Ed. 599 (1949). Criminal contempt is entirely different. The court order becomes a criminal statute and the conduct required for conviction requires willfulness and intent to violate the order. In re Joyce, 506 F.2d 373 (5th Cir. 1975).

While the order was clear in requiring the defendant to pay back wages, it is not clear in declaring that receiving funds back from the employees would constitute prohibited conduct. When this uncertainty is combined with the equivocal testimony which each witness gave on the stand, it does not seem to me that a trier of fact could find beyond all reasonable doubt that Barnette had willfully engaged in conduct that he could reasonably know was criminally prohibited. A court order, like a criminal statute, must be certain enough so that a person can know precisely the conduct which could land him in jail. Longshoremen v. Marine Trade Assn., 389 U.S. 64, 76, 88 S.Ct. 201, 19 L.Ed.2d 236 (1967). I do not think that situation existed in this jail-term criminal conviction.

UNITED STATES v. BARNETTE

UNITED STATES of America,

Plaintiff-Appellee,

v.

JIM S. BARNETTE,

Defendant-Appellant.

James H. Hogue, Acting Secretary of Labor, United States Department of Labor, Plaintiff-Appellee,

v.

TROY MOTORS, INC., a corporation, et al., Defendants.

Jim S. Barnette, Defendant-Appellant.

Nos. 76-1890, 76-2222.

United States Court of Appeals,
Fifth Circuit

March 25, 1977.

The United States District Court for the Middle District of Alabama at Montgomery, Frank M. Johnson, Jr., Chief Judge, entered judgments convicting defendant of civil and criminal contempt, and he appealed. The Court of Appeals affirmed in part and remanded in part, 546 F.2d 187. On petition for rehearing, the Court of Appeals, Tuttle, Circuit Judge, held that the rehearing petition misstated record, and the contention that

defendant did not receive notice of injunction against him was frivolous.

Rehearing denied.

1. Courts -405(18)

Contention, in a rehearing petition which misstated record, that defendant did not receive notice of injunction against him was frivolous.

2. Courts -405(18)

Where individual defendant had been personally enjoined and was found personally guilty of requiring refunds of part of monies which he and corporation had been prohibited from denying employees in original order, status of corporation as to its ownership was irrelevant, and language of original opinion as to the corporation being the wholly-owned corporation of the individual defendant was accordingly deleted.

Appeals from the United States District Court for the Middle District of Alabama.

ON PETITION FOR REHEARING

(Opinion January 31, 1977, 5 Cir., 1977, 546 F.2d 187)

Before TUTTLE, CLARK and RONEY, Circuit Judges.

TUTTLE, Circuit Judge:

The petition for rehearing misstates the record. It states:

> "Counsel contends that the Government absolutely had to show that Mr. Barnette received a copy of the order, which they did not and could not. The District Court's file reflects that only Mr. Barron signed acknowledging receipt of a copy of the Court's order where there is a place for the Defendant Barnette to have acknowledged. Mr. Barron continues to represent Mr. Dunn but has never represented Mr. Barnette for any reason at any time. . . ." [Emphasis added.]

The district court records shows that Bishop Barron was entered on the original docket in the district court in the original act in which produced the injunction here involved ("for all defendants"). It shows a stipulation of dismissal by all parties against Robert R. Dunn, an original defendant, consented to separately in the name of Troy Motors, Inc., Jim S. Barnette and Robert R. Dunn, each being signed by Bishop N. Barron. It further shows a waiver dated January 28, 1975 in the following language:

> "Come now the defendants and acknowledge that they have been properly served with a true copy of the complaint filed herein, waive any and all defenses to plaintiff's complaint and consent

> to the entry of judgment against them for the relief prayed in plaintiff's complaint."

This document is signed "Troy Motors, Inc., a Corporation, and Jim S. Barnette, by Bishop N. Barron, Attorney for Defendants." The record then shows the entry of the judgment, including the injunctive order, dated February 3, 1975, which contains the following entry:

> "Defendants consent to the entry of this judgment: Bishop N. Barron, Attorney for Defendants."

Finally, under the heading of "Acknowledgment of Receipt of a Copy of Judgment" there appears the following document:

> "Come now the defendants in the above action and acknowledge they have received a copy of the judgment entered by the Court in said cause on the 3rd day of February, 1975, and understand that said judgment restrains them from violating the minimum wage, overtime and recordkeeping provisions of the Fair Labor Standards Act of 1938, as amended, and further enjoins defendants from withholding payment of minimum wage and overtime compensation due their employees under the Act in the total amount of $7,759.54.
>
> Dated this 7th day of February, 1975.

s/ Bishop N. Barron
Bishop N. Barron
Attorney for Defendants"

[1] Now, for the first time, on petition for rehearing new counsel alleged that Barnette did not receive notice of the injunction against him. This contention is frivolous.

[2] To the extent that the opinion spoke of Troy Motors, Inc. as being the wholly-owned corporation of Mr. Barnette, this language should be deleted. Mr. Barnette was personally enjoined in the original order and he personally was found guilty by the trial court of requiring refunds of part of the monies which Troy Motors, Inc. and Barnette were prohibited from denying the employees in the original order. Therefore, the status of Troy Motors as to its ownership is irrelevant.

The petition for rehearing is DENIED.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 76-1890

D. C. Docket No. CR-76-1-N

UNITED STAES OF AMERICA,

Plaintiff-Appellee

versus

JIM S. BARNETTE,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

Before TUTTLE, CLARK and RONEY, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Alabama, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in

this cause be, and the same is hereby, affirmed in part and vacated in part, and this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court.

Roney, Circuit Judge, concurring in part and dissenting in part.

January 31, 1977

ISSUED AS MANDATE:

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

PETER J. BRENNAN, Secretary of Labor, United States Department of Labor, Plaintiff,	)	Civil Action File No. 74-289-N
v.	)	
TROY MOTORS, INC., a Corporation, ROBERT R. DUNN, and JIM S. BARNETTE, Defendants.	)	

J U D G M E N T

Plaintiff has filed his complaint and defendants have waived their defenses and have agreed to the entry of judgment without contest in accordance with the waiver previously filed herein. It is, therefore, upon motion of the plaintiff and for cause shown,

ORDERED, ADJUDGED and DECREED that defendants, their officers, agents, servants, employees and all persons acting or claiming to act in their behalf and interest be, and they hereby are, permanently enjoined and restrained from violating the provisions of sections 15(a)(2) and 15(a)(5) of the Fair Labor Standards Act of 1938, as amended

(29 U.S.C. 201, et seq.), hereinafter referred to as the Act, in any of the following manners:

1. Defendants shall not, contrary to sections 6 and 15(a)(2) of the Act (29 U.S.C. 206 and 215 (a)(2)), pay any employee who is engaged in commerce or in the production of goods for commerce, or who is employed in an enterprise engaged in commerce or in the production of goods for commerce, within the meaning of the Act, wages at a rate less than $2.10 an hour or such other minimum hourly rates as may hereafter be made applicable by amendment to the Act.

2. Defendants shall not, contrary to sections 7 and 15(a)(2) of the Act (29 U.S.C. 211(c) and 215(a)(5)), fail to make, keep and preserve adequate and accurate records of their employees, and the wages, hours and other conditions and practices of employment maintained by them as prescribed by existing regulations of the Administrator issued pursuant to section 11(c) of the Act, and from time to time amended and found in 29 CFR 516.

As to the claim for monetary relief asserted by the plaintiff, the jurisdiction of this court in this case extends only to the claims for back wages of the employees named herein and all other such claims are specifically excluded. Defendant agrees that in the event any employee not named above who has been employed by said defendant shoul bring an action under the provisions of section 16(b) of the Act (29 U.S.C. 216(b)), the said defendant will not

claim nor plead this action under section 17 in bar of any such action. The defendant further agrees that in the event of such a suit limitations under Section 6 of the Portal-to-Portal Act of 1927 (29 U.S.C. 255) shall be tolled for a period of time equal to the period from September 13, 1974, the date this suit was commenced, until the date of this judgment.

It is FURTHER ORDERED, ADJUDGED and DECREED that defendants, be, and they hereby are, enjoined and restrained from withholding payment of minimum wages and overtime compensation due their employees for the periods since June 17, 1971, in the total amount of $7,759.54. To comply with this provision of this judgment, defendants, within 90 days from entry of this judgment, shall deliver to the plaintiff a cashier's or certified check payable to "Wage and Hour - Labor" in the total amount of $7,759.54, less deductions for social security and withholding taxes. Plaintiff shall distribute the proceeds of such check to the persons named in Exhibit "A" attached hereto, or to their personal representatives, in the amounts indicated, less said deductions required by law, and any money not so distributed by the plaintiff within the period of one (1) year after payment in full pursuant to this Judgment because of inability to locate the proper persons or because of such persons' refusal to accept such sums, shall be deposited with the Clerk of this Court who forthwith shall deposit all such money with the Treasurer of the United States pursuant to 28 U.S.C. 2041 (1964).

It is FURTHER ORDERED that the costs

of this action be, and the same hereby are, taxed against defendants for which execution may issue.

ORDERED this 3rd day of February, 1975.

/s/ Frank M. Johnson, Jr.
UNITED STATES DISTRICT JUDGE

Defendants consent to the entry of this judgment:

/s/
Bishop N. Barron
Attorney for Defendants

Plaintiff moves for entry of this judgment:

/s/
William J. Kilberg
Solicitor of Labor

/s/
Beverley R. Worrell
Regional Solicitor

/s/
Norman H. Winston
Associate Regional Solicitor

/s/
Murray A. Battles
Attorney

Attorneys for Peter J. Brennan, Secretary of Labor, United States Department of Labor,

Plaintiff.

EXHIBIT "A"

Name	Gross Amounts Due
Ardine Barron	$ 332.38
Helen Taylor Blackburn	243.44
Bonnie Salter Brown	117.84
Jimmy Ray Carnley	67.14
Darrel Corley	1,036.66
Raymond Crews	1,155.27
Edward Levonne Davis	31.70
Eleise S. Floyd	234.01
Carol Ann Gay	155.67
Lucy S. Gaylard	60.34
Jimmy Ray Golden	1,349.88
William Ronnie Head	852.61
Willie A. Jackson	310.75
Leo Jones	136.05
Julius Kennedy	20.40
Judge Manley, Jr.	32.90
Terry Messick	170.53
William Dean Messick	882.31
Steve Roberts	6.65
Floyd E. Rogers	5.20
James Otis Salsberry	43.69
Annie C. Smith	124.80
James Daniel Smith	274.72
Hollin Turvin	114.60
TOTAL	$7,759.54

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

W. J. Usery, Jr., Secretary of Labor, United States Department of Labor	)	Civil Action No. 74-289-N.
vs.	)	
Troy Motors, Inc., a Corporation; and Jim S. Barnette	)	
United States	)	
vs.	)	Criminal Action No. 76-1-N.
Troy Motors, Inc.; and Jim S. Barnette	)	

(The above cases coming on for hearing at Montgomery, Alabama, March 22, 1976, before Honorable Frank M. Johnson, Jr., Judge, a hearing was conducted, at the conclusion of which the following Findings, Conclusions, and Judgment were made and entered by the Court:)

Findings, Conclusions, and Judgment

THE COURT: All right; the Court makes these Findings and Conclusions in both cases; that is, civil contempt proceeding in

74-289-N and the criminal proceeding in 76-1-N.

Upon consideration of the evidence that has been presented in this case, this Court finds that the defendant, Jim S. Barnette, is guilty of civil contempt, and that he's guilty of criminal contempt.

Generally, the Court finds that the evidence is clear, it's convincing, in both cases. In each case, this Court is convinced beyond a reasonable doubt of the guilt of the defendant, Jim S. Barnette, of having willfully and intentionally violated the order of this Court that was entered on February 3, 1975. On that date, the Court records reflect that this Court entered a final judgment in the case of John T. Dunlop, as Secretary of Labor, against Troy Motors, a corporation, Robert R. Dunn, and Jim S. Barnette; that this final judgment permanently enjoined and restrained the defendants, including, of course, Jim S. Barnette, their agents, servants, employees, and those acting in concert with them -- and that is significant in this case, because the evidence is clear to me that the returns or the kick-backs of the money that was paid pursuant to the Court's judgment was not only by Jim S. Barnette directly acting individually and personally, but acting through some of his employees, particularly the witness, Ronnie Head. As I stated, this Court's order on February 3, 1975, permanently enjoined and restrained Jim S. Barnette from violating the provisions of the Fair Labor Standards Act relating to minimum wage and overtime. The judgment also specifically enjoined Jim S. Barnette from withholding minimum wage and

overtime compensation that it was determined at that time was due his employees under the Act in an amount exceeding seven thousand dollars.

The evidence reflects that notwithstanding the entry of the judgment that this Court entered in this Civil Action 74-289-N, and particularly the specific provision of that judgment that restrained the withholding of unpaid minimum wage and overtime compensation due his employees under the Act, that Jim Barnette violated the judgment in that he did through coercion and intimidation, taking advantage of an employer-employee relationship, taking advantage of a superior-inferior relationship, require his employees to kick back or return certain percentages of the money that was paid to them through the Department of Labor pursuant to this Court's formal judgment. In doing this, the Court finds that Jim S. Barnette acted intentionally, he acted willfully; and his intentional and willful conduct violated the terms of the judgment and constituted contempt of Court in the civil case and constituted contempt of Court in the criminal case.

Now, I am not asking if you agree with what I have said or any portion of it; I am asking you if there are any essential Findings that are necessitated pursuant to the pleadings that I have not made -- Mr. Vines, Mr. Battles?

MR. MURRAY A. BATTLES: No, sir, Your Honor; I don't know of any.

THE COURT: And I ask you the same question, Mr. Sansone?

MR. AL J. SANSONE: With the exception of our pointing out to the Court that the complaint contained a violation or alleged violation of continued violation.

THE COURT: The Court finds that the evidence does not sustain --

MR. SANSONE: All right, sir.

THE COURT: -- that portion of the civil complaint that alleges a continued violation of the judgment of February 3, 1975, insofar as the minimum wage provisions and the overtime provisions are concerned. There was some evidence by the witness, Lucy Gaylard, to that effect; but it was ambiguous, and it will not sustain a finding of violation insofar as that part of the civil complaint and contempt is concerned.

MR. SANSONE: Thank you, sir.

THE COURT: Is there any reason why the Court should not at this time pronounce judgment in the civil case and pronounce judgment in the criminal case? Do you know of any?

MR. SANSONE: None.

MR. KENNETH E. VINES: No, Your Honor.

THE COURT: And do you know of any?

MR. SANSONE: None, Your Honor.

THE COURT: Based upon these Findings as just made by the Court and the Conclusions as announced, in the criminal case, Criminal

No. 76-1-N, upon the Court's Findings and upon the Conclusions, I now ask the defendant and his counsel if you have any statement to make prior to the time I impose judgment?

MR. JIM S. BARNETTE: Well, Your Honor, only thing I would like to say that I do admit and did admit taking the money back. I did not to my intention coerce anybody. I took it back of their own free will. I felt that they wanted to do this. Certainly if any of them had not wanted to the -- to give the money back, it was -- it wasn't mandatory on my part that they give it back. And that is -- that is about it.

THE COURT: Well, the only response the Court can make to that is that the evidence, the overwhelming part of the evidence, and the evidence beyond any reasonable doubt, reflects that that just isn't the case.

MR. JIM S. BARNETTE: (Nodded his head)

THE COURT: The contrary is true according to the credible evidence. All right; do you know of any reason why you should not be sentenced at this time in the criminal case?

MR. SANSONE: None, Your Honor.

THE COURT: It is the Order, Judgment, and Decree of the Court that you, Jim S. Barnette, are hereby declared guilty of criminal contempt of this Court. It is the further Order, Judgment, and Decree of the Court that you be and you are hereby committed to the custody of the Attorney General

for a period of thirty days. It is the further Order, Judgment, and Decree of the Court that you be and you are hereby fined the sum of one thousand dollars. The appeal bond in this case is twenty five hundred dollars. You can sign your own appeal bond. The Court will accept your signature on your own appeal bond if you desire to appeal it.

In the civil case, 74-289-N, as stated, it is the Order, Judgment, and Decree of the Court that the defendant, Jim S. Barnette, is guilty of civil contempt of this Court. The Judgment upon this finding of civil contempt is that the defendant, Jim S. Barnette, is ordered and directed to remit to the plaintiff, W. J. Usery, Jr., the total amount of minimum wage and overtime compensation repaid to him by any and all employees. The plaintiff attorneys, the attorneys for the plaintiff, Department of Labor, will file a schedule of the total amount according to their investigation with the Court within ten days. The defendant, Barnette, will be given ten days after that to contest any portion of that sechedule that you file reflecting the kick-backs. Do you understand that provision?

MR. SANSONE: Yes, sir.

THE COURT: All right. It is further Ordered that counsel for the plaintiff file in affidavit form cost of preparing and prosecuting this civil contempt proceeding and the amount deemed by counsel for the plaintiff as a reasonable cost and reasonable attorney's fees. That is to be done within ten days. Counsel for the defendant will have ten days subsequent to that time to contest any amount that is filed by counsel

for the plaintiff in response to this part of the Court's Order. After counsel for the plaintiff file the schedule as to the total amount of the kick-backs and defendants have the ten days to contest any or all of those amounts as to accuracy, the defendant, Jim Barnette, is Ordered to pay interest at the rate of eight per cent. That interest is to be paid to the employees from whom the kick-backs were taken.

The costs of this proceeding, civil action, be and they are hereby taxed against the defendant, Jim S. Barnette.

All right, gentlemen; I believe that concludes both cases. The appeal bond in the civil action -- the supersedeas bond in the civil action will be five thousand dollars, with surety on the supersedeas bond, if and when one is filed.

Anything further for the plaintiffs?

MR. VINES: No, Your Honor.

THE COURT: You gentlemen?

MR. SANSONE: No, sir, Your Honor; not at this time.

THE COURT: Recess until further ordered.

I hereby certify that the foregoing are Findings, Conclusions, and Judgment made and entered by the Court in above cases the 22nd day of March, 1976.

/s/ Glynn Henderson
Glynn Henderson,
Officail Court Reporter.

Done, this 22nd day
of March, 1976.

/s/ Frank M. Johnson, Jr.
United States District
Judge

Supreme Court, U. S.
FILED
AUG 3 1977
MICHAEL RODAK, JR., CLERK

No. 76-1573

In the Supreme Court of the United States

OCTOBER TERM, 1977

JIM S. BARNETTE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

SHIRLEY BACCUS-LOBEL,
JOSEPH S. DAVIES, JR.,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1573

JIM S. BARNETTE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 546 F. 2d 187. The opinion denying rehearing (Pet. App. 9a-10a) is reported at 549 F. 2d 398.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 1977. A petition for rehearing was denied on March 25, 1977. The petition for a writ of certiorari was filed on April 22, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a court order enjoining petitioner from paying less than the federal minimum wage and requiring him to reimburse his employees for prior wages

wrongfully withheld was sufficiently clear to apprise petitioner that the acceptance of partial kickbacks from those back wages would constitute disobedience of the order.

STATEMENT

Following a jury-waived trial in the United States District Court for the Middle District of Alabama, petitioner was found in civil contempt and convicted of criminal contempt under 18 U.S.C. 401. In the civil contempt case petitioner was ordered to turn over to the Secretary of Labor all back wages that he had paid pursuant to a court order and that had been returned to him by his employees. In the criminal contempt case petitioner was sentenced to 30 days' imprisonment and fined $1,000. The court of appeals affirmed the convictions, with one judge dissenting, but vacated the criminal contempt sentence and remanded for resentencing on the ground that 18 U.S.C. 401 does not permit the imposition of both a fine and imprisonment (Pet. App. 1a-8a).

The evidence, the sufficiency of which petitioner does not dispute, is set forth in the opinion of the court of appeals (Pet. App. 2a-6a). It showed that petitioner and Troy Motors, Inc., a corporation with which petitioner was associated, had previously been enjoined "from withholding payment of minimum wages and overtime compensation due their employees" (Pet. App. 28a) by the terms of a consent decree entered in a suit charging violations of the minimum wage and overtime-compensation provisions of the Fair Labor Standards Act, 52 Stat. 1060, as amended 29 U.S.C. 201, *et seq.* Petitioner and Troy Motors, Inc., were ordered to pay back wages of $7,759.54, of which $1,783.72 was awarded to employees Gaylord, Head, Corley, Golden, and Crews.

Each of the above employees thereafter was approached by either the company's lawyer or one of its supervising employees to discuss whether he or she would consider returning part of the back wages that had been paid. Eventually, each employee returned approximately two-thirds of the amount of the court-ordered back wages he had received. The court of appeals found it "perfectly clear that an agreement of some sort was entered into with respect to the percentage of the salary payments that were to be repaid to Barnette" and accepted the determination of the district court that "such agreement was one which the employees could not safely decline to accept when hammered out in the service manager's office in the presence of Barnette" (Pet. App. 6a-7a).

The court also noted (Pet. App. 6a-7a) "undisputed evidence that [petitioner] had caused the books of the company to contain false entries * * * had instructed the employees to give a false report if questioned about the charges which were made against them in order to obtain his full two-thirds * * * [and] had directed that false records be maintained for the purpose of covering up the receipt by him of the amounts that were not paid to him in cash."

ARGUMENT

Petitioner contends (Pet. 11-14) that the order of the district court (Pet. App. 13a-17a) requiring the return of back wages was not sufficiently precise for him to understand that the receipt of partial kickbacks of these back wages was prohibited. The claim is without merit. The district court order explicitly restrained petitioner from "withholding payment of minimum wages and overtime compensation due * * * employees for the periods since June 17, 1971, in the total amount of $7,759.54" and ordered that any back pay not distributed to the underpaid employees "because of such persons' refusal to accept

such sum, shall be deposited * * * with the * * * Treasurer of the United States * * *" (Pet. App. 15a). By its terms, therefore, the order put petitioner on notice that the funds were to be expended for the employees' benefit, or else paid to the United States, not returned to the Company by means of an agreement with the same employees that it had underpaid.

Moreover, in determining whether a defendant knew or should have known that his conduct was wrongful under the terms of a court order, not only the language but the entire background of the order should be considered. *Terminal Railroad Association of St. Louis* v. *United States*, 266 U.S. 17, 29; *United States* v. *Greyhound Corp.*, 508 F. 2d 529, 532 (C.A. 7); *United States* v. *Christie Industries Inc.*, 465 F. 2d 1002, 1007 (C.A. 3). Here, the acceptance of kickbacks from sums that petitioner was required to pay his employees plainly defeated the purpose of the order, which was to require that petitioner or the Company reimburse its employees for wages unlawfully withheld.[1] Indeed, the fact that petitioner sought to conceal the kickbacks reflects his understanding that such conduct was impermissible. In view of the language of the court's order, the context in which it was issued, and the purpose that it was intended to serve, a person of ordinary intelligence would have adequate notice that acceptance of kickbacks of the wages paid to reimburse the employees would violate the order. See *Buckley* v.

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[1]One district court has noted in rejecting a similar claim:

> The clear purpose of the aforesaid Act would be thwarted and subverted were this contention upheld. The relations of employer and employee are such that the latter could easily be misled through fear or influence to the total loss of his rights under the Act. It is wholly inconsistent with the end sought to be accomplished.

United States v. *Johnson*, 52 F. Supp. 382, 383 (W.D. N.Y.).

Valeo, 424 U.S. 1, 77; *United States* v. *Harriss*, 347 U.S. 612, 617.

The decision in *International Longshoremen's Association, Local 1291* v. *Marine Trade Association*, 389 U.S. 64, upon which petitioner relies (Pet. 8, 11, 13), is inapposite. In that case a union was required by court order to comply with a labor arbitration award stating that an employer's interpretation of an hours-of-work provision in a collective bargaining agreement was "correct." Although counsel for the union noted that the award contained only an abstract proposition and no command capable of enforcement, the district court declined to clarify its order. This Court reversed a citation against the union for civil contempt after further disputes resulted in strikes, holding that the district court's order violated the requirements of Rule 65(d), Fed. R. Civ. P., because it failed to state in specific terms the act that it commanded or prohibited. Here, by contrast, the district court's order specifically indicated the act that it was forbidding petitioner's retention of compensation owed to his employees.[2]

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[2]This case is also unlike *In Re Joyce*, 506 F. 2d 373 (C.A. 5), which petitioner cites (Pet. 13). There, the Fifth Circuit held that a district court order merely "requesting" a telephone company to install a pen register would not support a citation for contempt because the order was not mandatory and accordingly failed to put the defendant "on notice that his freedom was in jeopardy if he failed to comply with the order."

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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